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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW CALEB FORGILLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0604-CR-306
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0507-FC-41

August 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Matthew Caleb Forgille appeals from his sentence after he pleaded guilty to Sexual Misconduct with a Minor, as a Class D felony. He presents one issue for our review, namely, whether the trial court abused its discretion when it imposed an enhanced sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 7, 2005, Forgille engaged in sexual intercourse with his fifteen-year-old girlfriend. Forgille knew that his conduct was illegal because he had talked to his probation officer about that issue. Forgille was eighteen years old at the time. On July 26, 2005, the State charged Forgille with sexual misconduct with a minor, as a Class C felony.

On November 4, 2005, Forgille pleaded guilty to sexual misconduct with a minor, as a Class D felony, under a plea agreement that left sentencing to the trial court's discretion. At the sentencing hearing, the court mentioned Forgille's criminal history, namely, a charge filed one and one-half years earlier for child molesting. That charge was based on sexual acts Forgille had committed with his sister starting when he was eleven years old and lasting for a couple of years. Forgille had been sentenced to juvenile detention for that offense, and he had been in juvenile detention until shortly before the instant offense.

When sentencing Forgille for the instant offense, the trial court found no mitigating circumstances but did find aggravating circumstances:

> It is the judgment of this Court that the aggravating circumstances of this case, especially that of him knowing that it was illegal, you know? If you've got a fifteen[-] or sixteen[-]year[-]old boy and a fifteen[-]year[-]old girl and they don't know the difference, I can't get too excited. He knew the difference. He was in counseling. He knew that he got put away for doing it with his sister, and it didn't deter him, not one bit. I'm going to deter him. I'm going to sentence him to three years at the Indiana Department of Correction and he has earned every minute of it. He's fined a Thousand Dollars and costs.

Transcript at 39. This appeal ensued.

DISCUSSION AND DECSION

Sentencing decisions are generally within the discretion of the trial court and will only be reversed upon a showing of an abuse of discretion. Marshall v. State, 832 N.E.2d 615, 623 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. Id. The court may increase a sentence or impose consecutive sentences if the court finds aggravating factors. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001); Ind. Code § 35-38-1-7.1(b).

Indiana law requires that the trial court take the following steps during sentencing: (1) identify all significant mitigating and aggravating circumstances; (2) specify facts and reasons which lead the court to find the existence of each such circumstance; and (3) demonstrate that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence. Id. A single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

When a trial court performs the required balancing process, the balancing test need not be quantitative and is generally qualitative. Archer v. State, 689 N.E.2d 678, 684 (Ind. 1997), amended on other grounds by 1998 LEXIS 8.[1] Furthermore, when the trial court properly identifies and articulates all significant aggravators and mitigators, proper balancing merely requires the trial court to indicate that the aggravating circumstances outweigh the mitigating circumstances. Carter v. State, 711 N.E.2d 835, 840 (Ind. 1999).

Forgille alleges that the trial court abused its discretion when it imposed an enhanced sentence. In particular, he maintains that the trial court imposed an enhanced sentence without finding a single aggravator. As Forgille notes, the trial court did not identify any aggravating or mitigating factors in the written sentencing order. But we examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. Westmoreland v. State, 787 N.E.2d 1005, 1009 (Ind. Ct. App. 2003). Here, at the sentencing hearing, the trial court identified two aggravators, namely, Forgille's knowledge that his conduct was illegal and his criminal history, which was close in time and nature to the instant offense. Thus, Forgille's argument that the trial court failed to identify aggravators in support of the enhanced sentence is without merit.

Forgille next argues that the trial court erred when it identified as an aggravator Forgille's knowledge of the illegality of his conduct. In particular, Forgille contends that knowledge of the illegality of the conduct "should be seen as an element of the crime and not an aggravating circumstance." Appellant's Brief at 11. We cannot agree.

[1] The amendment to the Archer opinion involved the sentence imposed in the final conclusion but did not affect the court's reasoning or holding.

Forgille cites to Tidmore v. State, 637 N.E.2d 1290, 1291 (Ind. 1994), in support of his argument that an element of an offense may not be used as an aggravator. But Tidmore does not support that contention. Indeed, the court in Tidmore held that elements of an offense may be used as an aggravating factor in some circumstances. Id. at 1292 (citing Townsend v. State, 498 N.E.2d 1198 (Ind. 1986) (court may consider an element of an offense such as possession of deadly weapon as aggravating factor if the court specifies why use of the weapon or threats with it constituted an aggravator)). As a result, Forgille has waived the argument because he has not cited authority in support of his argument that the trial court may not use an element of the offense as an aggravator. Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, Forgille also has not demonstrated that knowledge of the illegality of the conduct is an element of sexual misconduct with a minor as defined by Indiana Code Section 35-42-4-9(a). That statute provides that a "person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony." The statute does not list knowledge as an element of the crime, and Forgille acknowledges such when he argues that knowledge "should be seen as an element of the crime." Appellant's Brief at 11 (emphasis added). Thus, Forgille has not shown that the trial court erred when it identified his knowledge of the illegality of his conduct as an aggravator.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.